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No. 08-765

IN THE
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

JEREMY JAYNES,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. When confronted with a claim that a statute is substantially overbroad and thus facially unconstitutional, is a court required to compare the statute's constitutional applications to the statute's actual unconstitutional applications?

2. May a state, consistent with the First Amendment, prohibit the deliberate falsification of electronic mail transmission or routing information for unsolicited bulk email?

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

The ACLJ often appears before this Court on the side of First Amendment free speech claims. *E.g., Schenck v. Pro-Choice Network of Western New York,* 519 U.S. 357 (1999); *McConnell v. FEC*, 540 U.S. 93 (2003). The decision of the state supreme court in this case, however, represents a serious distortion of free speech jurisprudence.

The ACLJ has several interests at stake in this case. As an employer with staff who use email, the ACLJ supports the efforts of Virginia to eliminate falsified email spam, the processing of which burdens servers and wastes staff time. As an organization that sends out legitimate email, the ACLJ supports the efforts of Virginia to eliminate abusive bulk emails that, both by sheer number and by their unwantedness, detract from the effectiveness of legitimate emails. And as an organization employing attorneys who regularly litigate First Amendment issues, the ACLJ has a keen interest in the proper

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[1]Counsel of record for the parties received timely notice of the intent to file this brief. S. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

development of free speech jurisprudence.

SUMMARY OF ARGUMENT

The First Amendment does not confer a constitutional right to falsify the routing information for unsolicited bulk email. Such deliberate attempts at deception do not fall within the proper scope of the right to anonymous speech. The state supreme court therefore erred when it held that Virginia's statute prohibiting such falsification is unconstitutionally overbroad.

ARGUMENT

This case merits review both because of the immensely practical nature of the matter at hand -- battling the flood of email spam -- and the great importance of the First Amendment questions at stake.

The Supreme Court of Virginia erroneously struck down, on its face, a Virginia statute prohibiting the falsification of unsolicited bulk email transmission information. In so holding, the court below committed two fundamental errors.

First, the court held that the Free Speech Clause of the First Amendment confers a right to falsify bulk email routing information where -- unlike the facts in this case -- the sender is transmitting "political, religious, or other expressive [noncommercial] speech." Pet. App. 26. This is wrong. As explained below, there is no right deliberately to falsify sender information for unsolicited bulk email.

Second, the state supreme court held that, because, in its view, the Virginia statute applied unconstitutionally to this hypothetical subset of noncommercial

cases, the statute was therefore facially unconstitutionally overbroad. Pet. App. 25-27. This is wrong as well, as it replaces the requirement that a challenger show "substantial overbreadth" with a requirement that he merely identify "a conceivable unconstitutional application."

The Commonwealth of Virginia in its petition has ably addressed the lower court's failure to engage in proper overbreadth analysis. Virginia contends -- correctly -- that overbreadth analysis requires a court to compare the *constitutional* and *unconstitutional* scope of the challenged statute to determine whether the asserted overbreadth is substantial compared with the statute's legitimate scope. Pet. at 16-17. That comparison, however, is only necessary if the statute actually has some unconstitutional applications. Hence, the question Virginia presents fairly includes the predicate question whether the statute in fact has unconstitutional applications. S. Ct. R. 14.1(a). In this brief, amicus will address this predicate, foundational error, namely, the inaccurate conclusion that there is a First Amendment right to falsify sender information for unsolicited bulk email.[2]

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[2]As noted in the text, this predicate question is "fairly included" in the question Virginia sets forth in its petition. However, because correct resolution of this predicate question would entirely dispose of the case, amicus suggests that this Court both grant review and expressly add, as a separately listed question, the second "Question Presented" set forth in this amicus brief. This would highlight the significance of this important sub-issue.

THE FIRST AMENDMENT DOES NOT CONFER A RIGHT TO FALSIFY BULK EMAIL TRANSMISSION INFORMATION.

An essential premise of the decision below was the lower court's holding that it would be unconstitutional to forbid the deliberate falsification of unsolicited bulk email transmission information as to noncommercial messages. This holding represents a gross distortion of First Amendment jurisprudence. The court below was wrong and should be reversed.

Errors often have a kernel of truth that gives them a degree of plausibility. Here, the state supreme court invoked the genuine, and genuinely important, right to engage in anonymous political, religious, and other noncommercial speech. Pet. App. 23. That right, however, has no proper application in this context.

The First Amendment right to free speech shelters the anonymous pamphleteer. *Talley v. California*, 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-67 (2002). The right to free speech also protects the anonymity of those who engage in expressive association. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). In this way the First Amendment safeguards those who communicate unpopular messages, or who unite to further unpopular ideas, from "threats," "hostility," and "reprisals," *Bates*, 361 U.S. at 524.

None of these cases, however, involve *deliberate deception*. It is one thing to hand out an unsigned pamphlet, but quite another falsely to sign another's

name to it.

This Court's anonymous speech and association cases in no way imply a First Amendment right to falsify "caller i.d." telephone transmissions, to mislabel FedEx sender information, or to trick a cell phone into sounding a ringtone that falsely denotes a familiar caller. The court below therefore erred by reading these cases to create a First Amendment right to tamper deceptively with bulk email transmission information. Such activities do not implicate the "right to anonymous speech," and to say so trivializes that important right.

The court below gave great weight to the fact that private internet protocol (IP) arrangements require someone obtaining an IP address or domain name to "provide identifying contact information" to the registering organization, reasoning that "the only way such a speaker can publish an anonymous email is to enter a false IP address or domain name." Pet. App. 22-23 & n.11. But this logic is specious. First, the private IP rules do not constitute state action, and thus can no more violate the First Amendment than would a private club's requirement that its members provide identifying information upon joining. Second, the lower court's reasoning proves far too much, as it would equally argue for a constitutional "right" to provide false identifying information to the private registering organization upon setting up an email account or domain name in the first place.

The lower court invoked the example of using pen names in the Federalist Papers. Pet. App. 26-27. But the question here is not the use of a *nom de plume*, but more akin to "Brutus" claiming a First Amendment right to submit an article using the *false* pen name "Publius."

In short, the state supreme court "has attempted to stretch . . . First Amendment doctrines well beyond the sort of activities these doctrines protect." *Rumsfeld v. FAIR*, 547 U.S. 47, 70 (2006).

This Court should grant review and reverse the judgment below. Respondent Jaynes has failed to show that the challenged anti-spam falsification statute would forbid *any* protected speech. Hence, that statute is not facially overbroad.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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